(1) No. 96 553 OCT 7 1996

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

OFFICE OF THE CLERK

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

Petitioners,

- against -

BETTY LOUISE FELTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL A. CROTTY,
Corporation Counsel for the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1010 or 1056

LEONARD KOERNER, *
MARILYN RICHTER,
STEPHEN J. McGRATH,
PETER D. WINEBRAKE,
of Counsel.
* Counsel of Record

172 pp

APPENDIX : TABLE OF CONTENTS

ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

	SUMMARY ORDER
BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,	Nos. 96-6160, 6180, 6181

Plaintiffs-Appellees-Cross-Appellants,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Defendant-Appellee,

CHANCELLOR BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants-Appellants-
Cross-Appellants

- against -

----------x

----------x

RACHEL AGOSTINI, MARIA COSARCA, DIGNA DURAN, IVETTE ENCARNACION, MARIA SEJOUR, JOAN JACKSON, CHERYL MALCOUSU, TONYA STEVENS and ROSEMARIE VASQUEZ,

Defendants-Intervenors-Appellants-Cross-Appellants.

----------x

P R E S E N T:

HONORABLE AMALYA L. KEARSE,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges

HONORABLE MILTON POLLACK,
District Judge.[1]

---

[1] Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of August, one thousand nine hundred and ninety-six.

Appearing for Defendants-Appellants:	Stephen J. McGrath, Deputy Chief, NYC Corp. Counsel, N.Y., N.Y.
Appearing for Intervenors-Appellants:	Kevin T. Baine, Williams & Connelly, Washington, D.C.
Appearing for Defendant-Appellee	Howard S. Scher, U.S. Dep't of Justice, Washington, D.C.

Appearing for Plaintiffs-Appellees: Stanley Geller, N.Y., N.Y.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted by counsel for appellee United States Department of Education and was argued by counsel for the other parties.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed substantially for the reasons started in Judge Gleeson's Memorandum and Order dated May 20, 1996.

AMALYA L. KEARSE,
U.S.C.J.

J. DANIEL MAHONEY,
U.S.C.J.

MILTON POLLACK,
U.S.D.J.

MEMORANDUM AND ORDER OF DISTRICT COURT

No. 78-CV-1750

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, U.S. DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

MEMORANDUM AND ORDER

APPEARANCES:

STANLEY GELLER, ESQ.
750 Lexington Avenue
21st Floor
New York, New York 10022
Counsel for Plaintiffs

W. SCOTT SIMPSON
U.S. Dept. Justice, Civil Division
901 E. Street, N.W., Room 986
Washington, D.C. 20530
Counsel for Defendant
U.S. Dept. of Education

MARILYN RICHTER, ESQ.
Assistant Corporation Counsel
100 Church Street, Room 2-180
New York, New York 10007
Counsel for Defendant
Chancellor and Board of Education

KEVIN T. BAINE, ESQ.
KEVIN M. DOWNEY, ESQ.
EMMET T. FLOOD, ESQ.
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005
Attorneys for Defendant-Intervenors

RICHARD E. DONOVAN, ESQ.
Kelly Drye & Warren
101 Park Avenue
New York, New York 10178
Attorney for Defendants-Intervenors

JOHN GLEESON, United States District Judge:

This case concerns the use of federal funds to provide remedial education to educationally deprived children in low-income neighborhoods. There have been prior decisions in the Second Circuit and the United States Supreme Court,[2] familiarity with which is assumed.

Briefly, for some 30 years, federal funds have been allocated to local school boards for remedial education programs pursuant to Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 et seq., and its predecessor, Title I of the Elementary and Secondary Education Act of 1965. The

---

[2] Felton v. Secretary of Dep't of Education, 739 F.2d 48 (2d Cir. 1984), aff'd sub nom Aguilar v. Felton, 473 U.S. 402 (1985).

program will be referred to herein as the "Chapter 1" program.

The remedial instruction and other support services funded by the Chapter 1 program were (and still are) intended by Congress to benefit all eligible school children, whether or not they attend public schools. The defendant Chancellor of the Board of Education (the "Board"), the "local education agency" that proposed and implemented the Chapter 1 program for New York City, has provided in-school remedial instruction to public school students since the federal program began. Until 1985, the Board provided in-school remedial education instruction to qualifying private school students as well. However, the practice of sending public school teachers and guidance counselors into New York's private schools, the overwhelming majority of which are religious schools, was challenged on Establishment Clause grounds, and the

Supreme Court agreed with plaintiffs that this use of public funds violated the First Amendment. Aguilar v. Felton, 473 U.S. 402 (1985).

On remand, this Court (Hon. Edward R. Neaher) issued an order, dated September 26, 1985, permanently enjoining the New York City Board of Education from using Chapter 1 funds to send teachers or guidance counselors into these religious schools. The Board has since devised several alternate (and mostly off-premises) methods of delivering these services to religious school students, the validity of which is not at issue here.

In the years since the Supreme Court's Aguilar decision, the landscape of Establishment Clause decisions has changed. The life expectancy of Aguilar itself is, to put it mildly, subject to question. Indeed, three justices of the Supreme Court have declared that Aguilar "should be overruled at the earliest opportunity." Board of Education

of Kirvas Joel v. Grumet, 114 S.Ct. 2481, 2515 (1994) (Scalia, J., dissenting (joined by Chief Justice Rehnquist and Justice Thomas)). A fourth, who dissented in Aguilar, has expressed a desire to reconsider it and has strongly indicated that it should be overruled. Id. at 2498 (O'Connor, J., concurring). Finally, a fifth justice has stated that the Aguilar decision "may have been erroneous," and that it may be necessary to reconsider it "in the interest of sound elaboration of constitutional doctrine." Id. at 2505 (Kennedy, J., concurring). These statements have made the Board, which continues at an indisputably enormous expense to use alternate methods of delivering Chapter 1 instruction to parochial school students, eager for an opportunity to get rid of the Aguilar decision.

This motion has been brought for that purpose. The Board has moved pursuant to Rule 60(b) of the Federal

Rules of Civil Procedure for relief from the injunction entered by Judge Neaher. Defendant-Intervenors, who are parents of eligible children who attend nonpublic schools, have joined in the motion. Although both the Board and the Defendant-Intervenors suggest in their arguments that this Court can properly pronounce Aguilar dead and afford them relief from the injunction, at bottom all they seek is a procedurally sound vehicle to get the issue back before the Supreme Court.[3] The defendant Secretary of the U.S. Department of Education, who has supported the Board throughout this litigation, has observed that I cannot grant the motion because the Supreme Court has spoken in this very case, and its decision is not only binding precedent, it is also law of the case. Although the language of its

---

[3] See, e.g., Reply Memorandum of Law in Support of Defendant Chancellor's Motion for Relief From Judgment at 4 ("Defendant would be delighted to go directly to the United States Supreme Court. This course, however, is not available.")

submission is somewhat elliptical, the Secretary also appears to want an order that will eventually allow all of the defendants to seek reconsideration by the Supreme Court of its prior decision in the case.[4]

Insofar as it is relevant to this motion, Rule 60(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . (3) fraud . . .; (4) the judgment is void; (5) the judgment has been reversed or otherwise

---

[4] Specifically, the Secretary states that although the motion cannot be granted, "we should not be understood to suggest that a reconsideration of [Aguilar] would be inappropriate in the Supreme Court . . . . [W]e preserve our right to support a request by the Chancellor that the Supreme Court reconsider its ruling in this case." Federal Defendant's Response to Chancellor's Motion for Relief From Judgment at 6.

> vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ...

The Board and the Defendant-Intervenors seek relief from Judge Neaher's injunction pursuant to clause 5. Relying on Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992), they contend that a party seeking prospective relief from an injunction may meet its initial burden by showing either a significant change in the factual conditions or in the law. They contend that the criticisms of Aguilar by five Supreme Court justices in the Kirvas Joel case not only portend a significant change in the law, but actually constitute one.

Rule 60(b) (5) may properly be invoked to afford relief from an injunction when a change in the decisional

law makes it no longer equitable to enforce it. New York State Ass'n For Retarded Children v. Carey, 706 F.2d 956, 967 (2d Cir.), cert. denied, 464 U.S. 915 (1983); see generally 11 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, ¶2863 (1995). The Court in Rufo held that "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." 112 S.Ct. at 762. The principle applies to injunctions, and the Supreme Court has observed that "there are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 650 n.6 (1961).

I am mindful of the competing interest at issue here: the finality of judgments. Rule 60(b) may not be used as a substitute for appeal. However, it is plain that

the Board's motion does not offend that rule. Indeed, there could have been no further appeal from the adverse decision by the Supreme Court in 1985. Moreover, it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now.[5] Finally, the heart of the Aguilar result was the injunctive relief that restricts the Board's use of Chapter 1 funds now and into the future. In these circumstances, allowing the defendants to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done. See C. Wright, et al., supra, § 2851 at 227.

---

[5] As noted below, it is possible to make too much of the Aguilar-bashing mentioned above. The various comments about the decision in Kirvas Joel were made (or joined in) without the benefit of briefing and oral argument, and three of the five Justices involved were not on the Court when it decided Aguilar.

Although plaintiffs have not explicitly relied on the law of the case doctrine in their effort to convince the Court not to "entertain" the motion, the doctrine deserves brief mention in this unusual procedural setting. It generally prevents a district court from deviating from a mandate from above. "However, the doctrine is limited by discretion and should be discarded for a 'compelling reason' such as 'an intervening change of law, significant new evidence, or the need to correct a clear error of law or manifest injustice.'" Whimsicality, Inc. v. Rubie's Costume Co., 836 F.Supp. 112, 116 (E.D.N.Y. 1993) (quoting United States v. Salerno, 932 F.2d 117, 121 (2d Cir. 1991)). Thus, if the Board were able to satisfy its burden of demonstrating a sea change in the law since Aguilar sufficient to warrant relief under Rule 60(b), the law of the case doctrine would not preclude such relief.

Finally, plaintiffs' assertion that the motion is untimely is without merit. Under the rule, the motion must be made "within a reasonable time." Whether that has occurred depends on the facts of the case, the reason given for the delay, and whether the plaintiffs are prejudiced by the delay. Emergency Beacon Corp. v. Barr, 666 F.2d 754, 760 (2d Cir. 1981); see generally C. Wright, et al., supra, § 2866. Although the grist for the motion also includes the general development of the Establishment Clause cases since Aguilar, the Board relies most heavily on the opinions in Kirvas Joel, which was decided on June 27, 1994. By resolution passed on June 7, 1995, the Board committed to seeking an overruling of Aguilar. Counsel for the Board has stated that, in light of the need to digest and discuss the issue, and its the [sic] obvious political sensitivity, the Board acted as expeditiously as could reasonably be expected. Plaintiffs have not contested those

representations, and in any event I accept them as a reasonable explanation for the delay in filing the motion, which occurred within a reasonable time after the Board's resolution.

Furthermore, there is no cognizable prejudice to plaintiffs as a result of the delay. True, they may lose what they obtained in 1985 if this case makes it back to the Supreme Court, but they have not suggested that they have been handicapped in litigating the issue by the passage of time.

In sum, I conclude that the Board has properly proceeded under Rule 60(b) to seek relief from the injunction. In a proper case, the rule is available for such relief when the intervening decisional law renders inequitable the continued enforcement of an injunction. Indeed, as a procedural device, it is far preferable to contemptuously defying the injunction by placing teachers

back in the parochial schools, the course that, according to counsel for plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction. Even assuming such a contempt citation would in fact permit review of the underlying merits of the Aguilar decision, I see no reason for reading Rule 60(b) to require such a result, and plaintiffs have provided none. Finally, under all the circumstances, the motion has been filed within reasonable time.

Having concluded that the motion is procedurally firm, I deny it on the merits. There may be good reason to conclude that Aguilar's demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, [it] does seem clear to me that the Board should be permitted to seek the reconsideration of Aguilar that a majority of the Supreme

court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

The motion is denied.

So Ordered.

JOHN GLEESON
UNITED STATES DISTRICT JUDGE

Dated: Brooklyn, New York
May 20, 1996

JUDGMENT DATED SEPTEMBER 26, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

JUDGMENT

A memorandum order of the Honorable Edward R. Neaher, United States District Judge, Eastern District of

New York, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, and the Clerk of Court having entered the judgment on October 20, 1983, and

An order of the United States Court of Appeals for the Second Circuit having been filed on July 9, 1984, reversing the order of the District Court and directing the District Court to enter judgment granting plaintiffs' cross-motion for a judgment declaring that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, et seq., violates the Establishment Clause, and an appropriate injunction, and directing that the District court should afford sufficient time for the City to propose and the Secretary to approve an alternative plan, and staying the issuance of a mandate until

thirty days after the final disposition of any timely petition for rehearing or suggestion for rehearing en banc, in order to enable defendants, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof, and

A judgment of the Supreme Court of the United States having been filed on July 31, 1985, affirming the judgment of the Court of Appeals, and the mandate of the Supreme court having issued to the Court of Appeals on the same date, and

The mandate of the Court of Appeals having been filed in the District Court on August 26, 1985, it is

ORDERED and ADJUDGED that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, et seq., as

superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801, et seq., violates the Establishment Clause of the First Amendment on entanglement grounds to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools, and it is further,

ORDERED and ADJUDGED that the defendants, the Secretary, United States Department of Education, and the Chancellor of the Board of Education of the City of New York, are permanently enjoined from using public funds for any plan or program under Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801, et seq., to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on

the premises of sectarian schools within New York City, and it is further,

ORDER and ADJUDGED, that in accordance with the opinion of the Court of Appeals, which was affirmed by the Supreme Court, this judgment shall be stayed until the start of the September 1986 school year, on condition that the Chancellor of the Board of Education of the City of New York shall, commencing December 2, 1985, and each 60 days thereafter, submit a written report to the Court and to counsel for the plaintiffs describing in reasonable detail the progress being made to conform the City's Title 1 plan to the requirements of this judgment.

_____

U. S. D. J.

Dated: Brooklyn, New York
September 26, 1985

DECLARATION OF MARGARET O. WEISS SUBMITTED IN SUPPORT OF PETITIONERS' RULE 60(B) MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

DECLARATION

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title 1 of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § § 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I have worked for the Board of Education of the City School

District of the City of New York ("the Board" or "the Board of Education") since 1965.

3. I have worked for the Bureau of Nonpublic Reimbursable Service ("the Bureau") since 1972. In that year, I became a field supervisor for corrective reading for the Chapter 1 (then called Title 1) program, and in 1974 I became the coordinator of the Chapter 1 Reading Skills Center program, which serves severely disabled readers. As coordinator, I was responsible for training and supervising the teaching and administrative staff of the program, developing courses of instruction for over 400 children and implementing the program. In 1979, I became Assistant Director of the Bureau, and in 1985, I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional

teaching licenses and two professional certifications in school administration from the New York State Education Department. I also hold one teaching license and three licenses in education administration from the Board of Education.

5. I submit this declaration in support of the motion of defendant Chancellor of the City School District of the City of New York (denominated in the caption as the Chancellor of the Board of Education of the City of New York), which seeks relief from this Court's judgment, dated September 26, 1985, aff'd., 787 F.2d 35 (2d Cir. 1986), which permanently enjoined the Chancellor "from using public funds for any plan or program under [Chapter 1] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools

within New York City ...." (Slip opinion, at 2. A copy of the judgment is annexed as Exhibit "1.")

6. By resolution dated June 7, 1995 the Board of Education of the City School District of the City of New york (hereinafter "the Board of Education"), authorized the commencement of legal proceedings seeking relief from the judgment. The Board of Education concluded that these proceedings should be commenced because of the adverse effects of the judgment, and the clear indication, based on the opinions of several Justices of the United States Supreme Court, that the judgment no longer reflects current law. In pertinent part, the resolution authorizes that relief be sought from the judgment:

> ...in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United

States Supreme Court Justices that Aguilar v. Felton should be revisited...

(A copy of the resolution is annexed as Exhibit "2.")

Brief Overview of the Chapter 1 Program

7. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial; supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. § § 2721(a), 2723(a); 34 C.F.R. § 200.6(c).)

8. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United State Department of Education required that private school students receive services that are

"comparable" to those provided to public school students. More recent statutory enactments and regulations continue that requirement by mandating that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. § § 76.654(a), 200.50(a)(1), 200.71(b).) (Effective July 1, 1995, pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat.l 3517, the name of the program will change from "Chapter 1 of Title I" to simply "Title I." However, in this declaration, the program is referred to as Chapter 1, and the cited statutory provisions are those in effect prior to July 1, 1995, since this motion primarily concerns a time period prior to July 1, 1995.)

9. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency

("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. § 2722(b).) The Board of Education is the LEA for the City of New York.

10. It should be noted that the City of New York is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 1590, et seq.) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the

Chapter 1 services for private school students administered by the Chancellor.

11. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. In school year 1993-94 (the most recent year for which complete statistics are available), the program served 259,097 students. Of these, 237,200 students attended public school and 21,897 students attended private school.

12. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged, from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas -- reading, mathematics and English as a Second Language.

13. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

14. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

15. These same basic services have been provided over the three decades that the Chapter 1 program has been in existence. These services have always been designed to supplement, and not supplant, the students' regular classroom instruction. What has changed, as a result of this litigation, have been the methods by which the services have been delivered to students who attend private

religious schools. This case reached the United States Supreme Court, which held, in Aguilar v. Felton, 473 U.S. 402 (1985) ("Aguilar"), that the Board's provision of Chapter 1 services by publicly employed teachers and other professional employees inside religious schools violated the Establishment Clause. This Court's September 26, 1985 judgment, enjoining this method of providing Chapter 1 services, followed.

Chapter 1 Services for Private Schoolchildren Before the Judgment

16. When the Chapter 1 program began, in 1965, the Board of Education provided services to private school students after the students' regular school day was completed. However, it was quickly concluded that these after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and

teachers were tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities.

17. The Board of Education consulted with other LEAs around the country, and learned that they were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the Chapter 1 services for public schoolchildren.

18. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and in most instances were used exclusively for the Chapter 1 program.

19. As is clear from the record in this case, the method of providing Chapter 1 services to religious school students prior to the judgment, in-school services during the regular school day, was highly successful from an educational standpoint. Annual reports by independent evaluators found that private school students who participated in the program showed measurable improvement in overcoming their educational achievement

deficits. The program was also far less expensive to operate than an off-premises program. (For a complete description of the prejudgment program, the Court is referred to the Joint Appendix which was submitted to the United States Supreme Court, a copy of which is annexed as Exhibit "3")

20. The Board's program was not atypical; beginning in 1965 or soon hereafter, throughout New York State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religious schools were largely provided inside the religious schools by publicly employed teachers and other professionals. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of the New York State Education Department, to William Bennett, Secretary of the United States Department of Education, annexed hereto as Exhibit "4")

Alternative Service Delivery Methods After this Court' s 1985 Judgment

21. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school students and 21,958 private school students, for a total of 194,221 students. All but 52 of the participating private school students attended religious schools, and were therefore affected by this Court' s judgment. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren, who attended 252 private religious schools. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by this Court' s judgment following the Aguilar decision.)

22. In August 1985, the United States Department of Education issued a written Guidance on Aguilar v. Felt on and Chapter 1 (a copy of the Guidance

is annexed hereto as Exhibit "5.") In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 finds could not be expended, unless the LEA' s Chapter 1 program provided for equitable services to private school children Thus, the Board was legitimately concerned that if its post-Aguilar Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program, for both public and private schoolchildren, would be jeopardized.

23. On September 26, 1985, this Court issued its judgment permanently enjoining the provision of Chapter 1 services by public school teachers and guidance counselors on the premises of sectarian schools. The judgment included a stay until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to the

students who attended these sectarian schools. (Exhibit "1," annexed.)

24. By memorandum dated July 22, 1985, the New York State Department of Education identified four possible alternatives for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternatives were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms and 4) through instructional technology (Memorandum dated July 22, 1985 from Robert D Stone, General Counsel of the New York State Department of Education to District Superintendents, etc., annexed hereto as Exhibit "6").

25. These four suggested alternatives are the four delivery methods which the Board has used to comply with this Court's judgment following Aguilar ("post-Aguilar delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public

school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

26. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-Aguilar delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

27. As discussed further below, providing Chapter 1 services to students inside their own schools is preferable to using the post-Aguilar delivery methods. Judge Friendly had noted that alternatives to in-school services "are almost certain to be less effective, more costly, or both." Felton v. Secretary, U.S. Dep't. of Educ., 739 F.2d 48, 71 (2d Cir. 1984). Judge Friendly's prediction was accurate; the alternatives have been less effective and more costly than in-school services.

Public School Sites

28. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building. Obtaining public school sites for use during the regular school day is difficult, because of the lack of excess space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, school overcrowding was so severe in some neighborhoods, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

29. The use of public school sites also creates a loss of instructional time, which is a serious concern for Chapter 1 students. The Board therefore sought to

minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the alternative site.

30. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes from approximately 9 a.m. to 2:30 p.m. Private school students who attend a

public school site which is within one block of their own school normally walk.

31. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools; however the offer was only accepted by students from 52 private schools. The result was a dramatic decrease in the number of private school students receiving Chapter 1 services. In school year 1986-87, the first year in which the post-Aguilar program was implemented, the overall number of participating private school students decreased by approximately 50% from the number participating in the prior school year

32. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel

between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the proposed route between the two schools; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would attend public schools which were closer to the private school than the public school site offered; however there was no available space in those pubic schools.

33. Since the post-Aguilar delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter 1 program. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter

1 services at 49 public school sites. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites (either exclusively or as part of a combination program, as discussed below).

34. Most of the decrease in public school utilization is due to increased overcrowding in the public schools Of the 34 public school sites which were dropped between 1987 and 1994, 23 were lost because the public school needed the classroom space for its own students' regular educational program.

35. On October 31, 1986, the student enrollment in New York City' s public schools was 940,208. On October 31, 1994, the student enrollment was 1,034,235. This is an increase of 10%, in just 8 years.

36. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where

Do We Go from Here? (a copy is annexed hereto as Exhibit "7"), public school overcrowding became particularly severe starting in the late 1980' s. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class size, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "7," pp. ES1, 1, 3 (figure 2).)

37. As the Comptroller' s Report indicates, the school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions,. some drastic, are being explored. These include double shifts

(students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "7." pp. ES1, 30-50).

38. For purposes of the Chapter 1 program, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school district. As explained in the Comptroller' s Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a result, the overcrowding is far more severe in these neighborhoods. (Exhibit "7," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the

student reside within the attendance boundaries of a participating public school in a low-income area, the Chapter 1 programs are often concentrated in areas where large numbers of immigrants reside and the public schools are most crowded

Mobile Instructional Units ("MIUs")

39. As discussed above, when the Board first created its post-Aguilar delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the Chapter 1 students of 48 private schools.

40. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

41. The MIUs are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent New York City health and safety code requirements for space occupied for the instruction of children.

42. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under New York State Department of Education guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter I staff and private school staff or private school parents.

43. The MIUs are expensive, and the Board accordingly sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost.

The interior of each MIU contains a folding partition; when the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 3 or 4 students, can simultaneously accommodate either a small English as a Second Language class, or a guidance session, or a parent-teacher conference, etc.

44. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in their experience, vandalism and insurance coverage were also expensive. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance.

45. The contract further requires the supplier to build and maintain spare vehicles, which can be used as

replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

46. Three photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. (d/b/a New York Bus Service) are annexed hereto as Exhibit "8." The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas

are all relatively high and small, and the windows are covered with a heavy wire grid.

47. Each MIU bears the words "New York Bus Service" on all four sides in large, contrasting lettering, and bears a large decal of the Board of Education seal on two sides (see photographs at Exhibit "8.") The MIUs do not obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school.

48. There is limited storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. The teacher replenishes supplies from the surplus stock

approximately once a month or less frequently. There are no bathrooms or lunchrooms on the MIUs.

49. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The MIUs are generally parked either on the same block as, or around a corner from, an entrance to each private school. When not in use for Chapter 1 purposes, the MIUs are garaged in a facility owned or leased by the supplier.

50. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools' educational programs.

51. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private

contractors for the leasing of MIUs. During the first three school years of our post-Aguilar program, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 Mrs., which were delivered over the next two school years. By the end of 1990-91, delivery was complete and the Board was leasing 128 MIUs. No additional MIUs have been leased; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

52. The number of students receiving services in MIUs (either exclusively or as part of a combination program, as discussed below), has increased over the years. In 1986-87, 5,503 students from 72 private schools received services in MIUs; in 1993-94, ~ 1,622 students from 141 private schools received services in MIUs.

Leased Sites

53. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students. From the time of the Aguilar decision to the beginning of the 1986-87 school year, the Board made inquiries concerning nearly 500 potential leased sites. Approximately 475 of the original 500 Potential leased sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

54. The Board approves leased sites without regard to the religious affiliation, if any, of the owner.

Most but not all of the leased sites used for Chapter 1 services are owned by religiously-affiliated organizations. However, neither the interiors nor the exteriors of the buildings where the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, by signs that read: "New York City / Board of Education / Chapter 1 Facility".

55. Further, the only activity which occurs at each leased site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the site and no religious activity or instruction may occur anywhere in the building where the site is located.

56. Each of the Board's leased sites is in a building that is separate from the private school building(s) whose students are served at the sites. Near the beginning

of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students.

57. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance) Thus, the use of these leased sites reduced the travel time and increased the regular classroom instructional time for the students.

58. In 1986-87, 1,580 students from 17 private schools received Chapter 1 services in leased sites. Commencing in January 1987, the annual rental for these thirteen sites was $4.75 per square foot, which was at the low end of the range of the Board' s usual cost for similar leased space.

59. The use of leased sites has continued in similar fashion. In the 1993-94 school year, 1,601 students

from 14 private schools received Chapter 1 services in eleven leased sites (either exclusively or as part of a combination program, as discussed below).

Computer-Assisted Instruction

60. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

61. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

62. Chapter 1 teachers are not present in the private school during CAI use. When students use the

computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the students' work, print and review reports of their progress, and adjust each student' s curriculum as appropriate.

63. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees The CAI technician' s primary duty is to maintain order among the students They also take attendance, maintain student records and perform elementary functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

64. There are many electronic and physical safeguards to insure that the CAI computers are not usable

for any purpose other than Chapter 1 instruction Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to the main computer located at a Board of Education site when they are turned on; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

65. The remainder of the CAI computers installed in the private schools are personal computers that have their own central processing units and floppy disk drives The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices.

66. Not only is the software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to

these computers to students enrolled in the Chapter 1 program. The Board prohibits students who are not registered for CAI from using the **Chapter 1** computers. Private school staff are also prohibited from using the CAI computers at any time.

67. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command.

68. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in

the CAI rooms during CAI sessions are the students and the Board' s CAI technician. Religious symbols in the CAI rooms are prohibited.

69. Almost all CAI rooms are used only for Chapter 1 instruction. In three schools in which CAI sessions are held only two or three times a week, the CAI rooms are used for other purposes on the days when there are no CAI sessions.

70. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement;

however, this arrangement has been implemented in two other private schools since 1991.

71. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that they are only usable for Chapter 1 instruction.

72. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, through an internal modem which connects the lap-top to the software company. The Chapter 1 instructional programs are then

transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student' s work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

73. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use word processing, graphic or spreadsheet software in CAI.

74. CAI was first used in school year 1987-88, when 2,135 students from 22 private schools were served by CAI. The use of CAI has increased over the years; in 1993-94, 9,662 students from 149 private schools used CAI.

75. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Therefore, the Board implemented combination services, in which private school students who receive CAI also receive some face-to-face instruction from Chapter 1 teachers in public school sites, Migs, or leased sites.

76. In this combination program, CAI is generally used two days per week and face-to-face instruction one day per week The Board has been able to provide combination services to only a small portion of the students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined in some instances because private school students did not want to leave their school building.

77. Combination services were offered beginning in school year 1988-89 The number of students who received combination services are a subset of the number of students who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years, the use of combination services has increased; in 1993-914, 2,115 students from 63 private schools received combination services.

Problems Created by Compliance with the Judgment

78. Compliance with this Court' s judgment has created a system for provision of Chapter 1 services to private school students that is more expensive, less educationally effective and less administratively efficient than the in-school delivery of Chapter 1 services which was used for private school students prior to the judgment. In-school delivery of Chapter 1 services is in all ways

preferable, and continues to be used for all public school students throughout New York City.

79. Of greatest concern, from an educational perspective, is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is an especially serious concern for Chapter 1 students, since they are the students who are most in need of instruction. The public school site and leased site alternatives often entail significant travel time.

80. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1

private school students are in the elementary school grades, and this task is often a major undertaking for young children in the winter.

81. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-Aguilar delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the

levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

82. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the other post-Aguilar delivery methods. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the Chapter 1 private school students who receive only CAI instruction do meet the New York State Department of Education' s educational gain standards for the Chapter 1 program, they do not perform as well, overall, as the students who receive face-to-face instruction.

83. Further, for Chapter 1 instruction to effectively supplement the students' regular instruction in reading, mathematics or English as a Second Language,

there must be coordination between the regular and Chapter 1 curricula, so that Chapter 1 instruction can supplement and reinforce the regular classroom instruction.

84. For this reason, the Chapter 1 statute and regulations and New York State Education Department guidelines mandate that the LEA's Chapter 1 program include effective strategies to coordinate the Chapter 1 curriculum with the students' regular educational programs, regardless of whether the students attend public or private school, and mandate consultation between Board of Education and private school officials to develop Chapter 1 services that effectively supplement the students' regular classroom instruction. (20 U.S.C. 2722(c)(3), 2727(a), 34 C.F.R. 200.51(a), 200.70.) In addition, the New York State Education Department guidelines mandate that Board of Education Chapter 1 staff and private school

staff coordinate their activities to achieve the educational objectives for their students.

85. Pursuant to Guidance issued by the United States Department of Education, the public school sites, neutral sites and MIUs are used for consultations concerning the Chapter 1 program between Board of Education and private school staff. (A copy of the June 1986 Guidance on Aguilar v. Felton and Chapter 1, issued by the United States Department of Education is annexed as Exhibit "9;" questions 24-28 concern consultation.) It is often extremely burdensome to hold consultations between the Board' s Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school site or leased site that is located a mile or more away from the private school. The private school staff must travel to the public school or leased site for a consultation meeting.

86. An alternative is to hold consultations between the Board' s Chapter 1 staff and private school staff by telephone. (See federal Guidance, Exhibit "9" annexed, question 28.) Obviously, this is not as effective as meetings, especially when the teachers need to refer to records

87. For CAI, the situation is even more cumbersome. The "consultation" by the Board of Education Chapter 1 teacher, who is located in a Board of Education office which may be across the City from the private school, is primarily through written computer-generated student progress reports, which are printed out in the CAI room upon electronic command. These reports are then delivered by the CAI technician to the private school principal.

88. The use of the MIUs is also cumbersome and inefficient for our Chapter 1 staff. Since there is

limited storage space for records on the MIUs, and since most of our staff is itinerant (approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who work full time, serve students from more than one private school during the course of their workweek), these professionals must frequently carry their records and files with them on a daily basis.

Costs of Compliance with the Judgment

89. Finally, taken together, the post-Aguilar delivery methods are far more costly than was the prejudgment provision of services in the private schools. The result has been a very significant expenditure of funds simply to deliver services in accordance with the judgment.

90. The Board of Education has spent $93,245,424 for the costs of compliance with the judgment for the school years 1986-87 through 1993-94. Of these

funds, $7,920,528 were taken "off-the-top" (see discussion below), in other words, from Chapter 1 funds which could otherwise have been used to provide additional instructional and support services to both public and private (including non-sectarian) schoolchildren in New York City. For ease of comprehension, a chart has been prepared showing these expenditures, broken down by year and funding source. This chart is annexed as "Chart A" and is incorporated, as though fully set forth, herein.

91. The costs of complying with the Aguilar decision have been burdensome to LEAs throughout New York State and the entire nation. Both the New York State Legislature and the United States Congress have recognized that this is a serious problem, and accordingly have made appropriations to meet some of these compliance costs.

92. After Aguilar, the State of New York allocated funds to cover part of the non instructional costs

incurred by LEAs in response to Aguilar. Section 9 of Chapter 683 of the Laws (of New York) of 1986, provided for the apportionment of $10 million dollars to LEAs around the State, allocated under Chapter 53 of the Laws of New York (the local assistance budget). Annual allocation of state funds under Chapter 53 began in the 1986-1987 school year, and continued through the 1990-1991 school year. No state funds have been allocated since then

93. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for non instructional goods and services required to comply with Aguilar. (34 C.F.R. 200.57(a)(2).)

94. In addition, beginning in the 1990-91 school year, the Board has been able to use approximately 15.2 million dollars in "carryover" funds to cover some of its Aguilar compliance costs. Carryover funds are unspent funds from prior years. These carryover funds were all originally allocated for private school students, and accrued during the early years following the judgment, because the number of participating private school students decreased dramatically during those years.

95. State funds allocated pursuant to Chapter 53, federal capital expense funds allocated pursuant to section 2727(d) and the carryover funds, have been sufficient to cover most, but not all of the Board' s expenditures for compliance with the judgment. (In two years these funding sources did cover all compliance costs.) The excess expenditures (the $7,920,528 referred to above) were taken "off the top" of the Board' s total Chapter 1 allocation.

96. Regulations promulgated by the United States Department of Education require that an LEA generally take the non instructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred (34 C.F.R. 200 52(a)(2))

97. This off-the-top policy, which was established by the United States Department of Education prior to the Aguilar decision, applies to the non instructional administrative costs of delivering Chapter 1 services to all participating students (whether they attend public or private, including non-sectarian, school).

98. Following the Aguilar decision, the United States Department of Education stated, in its August 1985 written Guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with

Aguilar. (Exhibit "5" annexed hereto, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R 200.52(a)(2).)

99. Although the necessity of taking funds off the top of the entire Chapter 1 allocation to meet the costs of complying with the judgment has been comparatively limited in the past, the situation will be very different in the near future.

100. New York State Chapter 53 funding ended after the 1990-91 school year and the national federal appropriation for capital expense funds, pursuant to section 2727(d), is likely to be reduced by approximately 50% for school year 1996-97 (In 1994-95, the appropriation was 41 million dollars; the United States Department of Education has requested that Congress appropriate only 20.5 million dollars for 1996-97.) It can be anticipated that New York

City' s share of the reduced national appropriation for capital expenses will also be substantially reduced.

101. In addition, the 15.2 million dollars in carryover funds which were used for compliance costs will be exhausted by the end of the 1994-1995 school year. Given this elimination and reduction of funding sources for compliance costs, if the annual costs of compliance with the judgment continue at roughly the current rate of approximately 15 million dollars, then in school year 1995-96, the Board may be forced to take approximately 5 million dollars off the top of the total Chapter 1 allocation simply for compliance costs, and beginning in school year 1996-97, the Board may be forced to take approximately 10 million dollars annually off the top of the total Chapter 1 allocation simply for compliance costs. As explained above, this is money which would otherwise be used to provide

additional instructional and support services to both public and private schoolchildren.

Specific Expenditures for Compliance with the Judgment

102. Expenditures for compliance with the judgment were made in four categories: shuttle transportation between the private schools and the public school and leased sites; the leasing of MIUs; the leasing of leased sites and administrative expenditures for CAI.

103. During the school years 1986-87 through 1993-1994, total expenditures in the four categories were: $279,877 for the (identifiable) costs of shuttle transportation; $83,729,440 for MIUs; $1,596,095 for leased sites and $1,625,487 for the administrative costs of CAI.

104. Again, for ease of comprehension, the expenditures made in these four categories are listed in the annexed Chart B. (The information set forth in Chart B is

incorporated, as if fully set forth, herein.) The figures in Chart B indicating the amount spent in various categories (e.g., MIUs, leased sites, etc.), show the actual expenditures for items in these categories; they do not include the "indirect cost" figure added to all Chapter 1 expenditures (except for purchases of equipment) to generate funds to cover general administrative overhead. Pursuant to New York State Education Department directives, for federal funds the indirect cost figure was 6.5% of the expenditure and for state funds the indirect cost figure was 5% of the expenditure. The indirect cost expenditures are described further below.

105. To set these very significant expenditures in an appropriate perspective, the total expenditures for the Chapter 1 program in New York City for all public and private (including non-sectarian) school students are listed in the annexed Chart C. (The information set forth in Chart

C is incorporated, as if fully set forth, herein). During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was $190,146,061. During the intervening years, Congress appropriated additional funding for Chapter 1, and accordingly, the Chapter 1 allocation for New York City has increased. During 1993-94, total expenditures for the Chapter 1 program in New York City, for both public and private school students was $425,440,299.

Shuttle Transportation

106. The Board of Education does not maintain records which distinguish expenditures for shuttle transportation between the private schools and public school sites, from expenditures for transportation between the private schools and leased sites.

107. Further, pursuant to reporting requirements of the New York State Department of Education, a portion of the Board' s costs of transporting private school students between public school sites and leased sites during the school years 1988-89, 1989-90, and 1990-91 were aggregated with other costs. The Board's expenditures for shuttle costs, as listed in this Declaration and in the annexed Chart B, are the identifiable expenditures.

MIUs

108. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of $106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of $75

per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

CAI

109. Under regulations promulgated by the United States Department of Education, expenditures for computers used for CAI (as well as expenditures for CAI technicians) have been considered instructional expenditures and therefore have been charged entirely to funds allocated for private school students. (34 C.F.R. 200.57(a)(2)(ii.).) These expenditures were not paid for by funds provided under Chapter 53 or section 2727(d), since those funds are reserved for non instructional administrative expenditures. Similarly, these expenditures were not taken off-the-top of the entire Chapter 1 allocation, since that procedure is also reserved for non instructional administrative expenditures. There are, however, some non instructional administrative expenditures for CAI. These are **for central office**

expenses, such as the salaries of central office personnel who worked with CAI.

Regular Noninstructional Administrative Costs

110. There are, of course, also general non instructional administrative expenditures for operating the Chapter 1 program in New York City for both public and private school students. These expenditures have nothing to do with compliance with the judgment; they are simply the usual expenditures for administrative overhead, such as central office expenses.

111. In accordance with the terminology and practice adopted by the New York State Education Department, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

112. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by the New York State Education Department (which prohibits any assessment of indirect costs against purchases of equipment)

113. The indirect cost rate for the Board of Education during the years 1986-87 through 1993-94 was 6.5% for federal funds used in the Chapter 1 program. For the State funds provided under Chapter 53, the indirect cost rate was 5%. For record keeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment, which is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the non instructional administrative costs of

seeing both public and private school students be charged to an LEA' s total Chapter 1 funds. (34 C.F.R. 200.52(a)(2). For the State Chapter 53 funds, the Board added a uniform 5% administrative charge to each component of the budget funded by Chapter 53, except expenditures for equipment.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

114. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious affiliation, gender, race, national origin, or whether they speak languages other than English

115. The union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board of Education is the United Federation of Teachers ("the UFT"). These

employees are assigned to union chapters, based on their work assignment. The employees in these four job titles who serve private-school students in the Chapter 1 program are assigned to the "Nonpublic School Chapter" of the UFT. I am informed, based on information provided by the UFT, that over 60% of these professional employees are of a different religious affiliation than the religious affiliation of the private schools whose students they serve.

116. This figure is consistent with the Board' s own information and experience. As discussed below, approximately 86% of the private school students in the Chapter 1 program attend schools affiliated with the Roman Catholic Church. Although the Board does not ask its employees their religious affiliation, it is widely-known that a high proportion of the professional staff employed by the Board is of the Jewish faith. I am informed that it is for this reason that the public schools in New York City are

closed during major Jewish holidays, whereas offices throughout New York City government remain open. Given the high proportion of Jewish staff, there has always been a concern that there would be an insufficient number of employees in attendance on major Jewish holidays to adequately staff the public schools. There is no reason to believe that the staff assigned to the Chapter 1 nonpublic school program is of a significantly different religious composition than the Board's staff in general.

117. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nonsectarian. These figures were not

markedly different during the years 1986-87 through 1993-94.

118. My Bureau's written guidelines for our employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the judgment. The instructions are issued and distributed annually, and are designed to preserve the secular nature of the Chapter 1 program for private school students and to provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the guidelines for professional staff assigned to neutral (i.e., leased) sites, MIUs and CAI, and of the administrative procedures for CAI technicians, are annexed hereto as Exhibit "10.")

119. The Board of Education's collective bargaining agreement with the United Federation of

Teachers, provides that every tenured professional employee receives three such announced visits by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three such announced visits per year. The same requirements govern all professional employees who work for the Board. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year.

120. Although, as discussed above, the Board's staff consult with the private school staff to achieve effective coordination of the Chapter 1 and regular school curricula, it is the Board' s staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private

school students. The private school staff cannot dictate the content of instruction, or the methodology used to provide these services.

Dated: Brooklyn, New York
October 16, 1995

MARGARET O. WEISS

CHART A

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY FINDING SOURCE AND SCHOOL YEAR

School Year	State funds Chapter 53	Fed. funds § 2727(d)	Fed. funds Off the Top	Carryover funds	Total
1986-87	$7,506,800	N.A.	$169,701	N.A.	$7,676,501
1987-88	$7,484,000	N.A.	$954,867	N.A.	$8,438,867
1988-89	$8,600,000	N.A.	$297,221	N.A.	$8,897,221
1989-90	$8,507,618	$1,927,585	None	N.A.	$10,435,203
1990-91	$8,250,098	$3,291,362	None	$1,016,462	$12,557,922
1991-92	N.A.	$7,724,044	$3,562,720	$3,806,097	$15,092,861
1992-93	N.A.	$9,028,082	$1,823,682	$4,216,335	$15,068,099
1993-94	N.A.	$9,750,078	$1,112,337	$4,216,335	$15,078,750
TOTAL	$40,348,516	$31,721,151	$7,920,528	$13,255,229	$93,245,424

Notes

N.A. means Not Applicable

State funding under Section 9 of Chapter 683 of the Laws (of New York) of 1986, providing for apportionment of funds allocated under Chapter 53 of the Laws of New York (the local assistance budget) was not continued after the 1990-91 school year.

Federal funding for capital expenses under 20 U..S.C. 2727(d) was received beginning in the 1989-90 school year following the enactment of 2727(d) in 1988.
The carryover funds, which were unused funds from the private school (including non-sectarian) students' allocation were released by the U.S. Department of Education for compliance expenditures in June 1990.

Pursuant to New York State Department of Education guidelines, the state Chapter 53 funds include a 5% indirect cost charge for all expenditures except equipment.

The other funding sources are all federal funds, and pursuant to New York State Department of Education guidelines, include a 6.5% indirect cost charge for all expenditures except equipment.

CHART B

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT

BY TYPE OF EXPENDITURE AND SCHOOL YEAR

1986-87	MIU Costs	Leased Site Costs	CAI Administrative Costs	Shuttle Transportation Costs	Total
1986-87	$7,149,33	$135,532	N.A.	$ 26,630	$ 7,311,495
1987-88	$7,335,887	$387,963	$ 88,731	$ 104,531	$ 7,917,102
1988-89	$7,549,249	$279,082	$ 273,032	$ 25,248	$ 8,126,611
1989-90	$9,157,444	$198,508	$ 348,942	$ 31,329	$ 9,736,223
1990-91	$11,126,541	$280,402	$ 225,711	$ 28,211	$11,660,865
1991-92	$13,790,999	$151,832	$ 205,801	$ 23,068	$14,171,700
1992-93	$13.810,752	$ 75,106	$ 237,922	$ 24,672	$14,148,452
1993-94	$13,809,245	$ 87,670	$ 245,348	$ 16,188	$14,158,451
TOTAL	$83,729,440	$1,596,095	$1,625,487	$ 279,877	$87,230,899

Notes -

N.A. means Not Applicable

The dollar figures above are actual expenditures - they do a include the indirect cost additions (5% for state funds and 6.5% for federal funds except for equipment) which were included in the figures in Chart A

Shuttle Transportation Costs are not complete after the 1987-88 school year, because pursuant to New York State Education Department reporting requirements, some of these costs were aggregated with the costs of MIUs The shuttle transportation costs presented for school year 1988-89 and for the following years, represents the identifiable costs of shuttle transportation costs; the balance of these costs are included in the total MIU costs.

CAI Costs - These expenditures are only for administrative expenses, such as salaries and equipment for central office administrative personnel who work on CAI. Pursuant to federal regulation 34 C.F.R. 200.57(a)~2)(ii), expenditures for computers and software used for CAI, as well as the salaries of the CAI technicians, have been considered instructional expenditures. These expenditures have therefore been charged solely to Chapter 1 funds allocated for private school students, and are not included in the above table.

CHART C

TOTAL EXPENDITURES FOR CHAPTER 1 PROGRAM IN NEW YORK CITY FOR BOTH PUBLIC AND PRIVATE SCHOOL STUDENTS

BY SCHOOL YEAR

SCHOOL YEAR	TOTAL EXPENDITURES
1986-1987	$ 190,146,061
1987-1988	$ 197,657,498
1988-1989	$ 257,512,021
1989-1990	$ 327,733,794
1990-1991	$ 363,065,833
1991-1992	$ 382,904,292
1992-1993	$ 419,182,808
1993-1994	$ 425,440,299
TOTAL	$ 2,563,642,606

Note

These total figures include the expenditures for all Chapter 1 services provided to both public and private (including non-sectarian) school students, whether centrally, by the Chancellor, or by the community school districts.

AFFIRMATION OF STANLEY GELLER SUBMITTED IN OPPOSITION TO PETITIONERS' RULE 60(B) MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

78CV-1750 (Jg)

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

----------x

STANLEY GELLER, an attorney admitted to practice in the courts of the State of New York, under penalties of perjury, affirms the following:

Introduction

1. As attorney for the plaintiff in this action, I submit this affirmation in opposition to the motions of the defendant Chancellor of the Board of Education of the City of New York ("Chancellor") and the defendant-intervenors (Intervenors). As will be noted more fully in plaintiffs' accompanying memorandum of law, it is of the utmost significance that the defendant Secretary, United States Department of Education ("Secretary") has not made a similar motion or joined in the motion of the Chancellor or that of the Intervenors, but has flatly acknowledged that this Court does not have the power to grant the motions of his fellow defendants.

2. Plaintiffs' position is precisely that of the Secretary. We respectfully submit that this Court lacks the power to overrule the mandate of the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), which affirmed the unanimous decision of the Court of Appeals of this Circuit (sub nom., *Felton v. Secretary, United States Department of Education*, 739 F.2d 48 [2d Cir. 19843), and held that the Establishment Clause of the First Amendment to the United States Constitution prohibits the use of public funds to finance a plan or program employing public school teachers and other public personnel to provide instruction and counseling to students of religious schools on the premises of those schools.

3. What the Chancellor and the Intervenors now seek from this Court is an order or judgment that would relieve them from obeying that mandate. They seek such relief, moreover, knowing that it may not properly be

granted by this Court, but intending, after their motion is denied, to appeal from the decision of this Court to the Court of Appeals, knowing that their appeal may not properly be heard by that Court, and intending thereafter to apply for a writ of certiorari in the Supreme Court, in the hope that six Justices will be willing to grant the writ, and thereby to allow the applicants effectively to obtain a belated, second appeal to the Supreme Court from the determination of the Court of Appeals in *Aguilar*. It is respectfully submitted that no such procedure is permitted by any statute, rule or regulation, and that if any private citizen were to follow the same procedure, he or she would be sanctioned. The Chancellor and the Intervenors deserve the same treatment, no matter how noble they may claim their end to be.

4. Plaintiffs trust that this Court will not allow itself to be used as part of such a ploy. We ask the Court,

therefore, to decline to entertain the present motions, and to require the Chancellor and the Intervenors, if they are so advised, to seek a writ of mandamus from the Court of Appeals which we do not believe that Court will issue.

The Need for a Plenary Hearing

5. Although plaintiffs firmly adhere to our position on the law of this case, we are concerned that the factual claims of the defendants, and particularly those of their chief spokesperson, the Board of Education' s Margaret Weiss may be considered on their alleged "merits." As will be noted below, many, if not most, of the Weiss claims are based on pure hearsay. Others are based on conclusory generalizations. Still others are questionable on their face. In any and all events, all of those claims must fully and properly evaluated and considered in the light of the principle of separation of church and state embodied in the Establishment Clause, a

principle that was of such primary concern to our constitutional forefathers that they made it the first clause of the first of the ten Amendments to the Constitution that constitute the Bill of Rights. (See, the opinion of Justice Black, speaking for the major it,v of the Court in *Engel v. Vitale*, 401 U.S. 1 [1962].) If, therefore, and only if, this Court sees fit to entertain the pending motions, so as to enable them, improperly, to reach the Supreme Court, it is respectfully submitted that this Court should direct a plenary hearing of the Weiss claims in order that there will be an adequate record for the High Court.

The Bedrock Concerns Of Religious Liberty

6. It bears emphasizing that the Weiss claims relate only to educational concerns, as if those were the only concerns that need be considered in this matter. The same is true of the contents of all the other moving papers, except to the extent that they, tangentially, deal with

religious liberty concerns in their discussion of recent Supreme Court decisions. That such focus is deliberate and intended to divert this or any other Court' s attention from religious liberty concerns is made clear by the choice of terminology. After noting that *no less than 99%* of the private schools in this City whose students receive Chapter 1 services are "private religious schools" (there are, of course, no public religious schools), Weiss, and defendants generally throughout their papers, chose to refer to the schools in question as "*private*" schools rather than "*religious*" schools!

7. One critical set of facts has clearly been established by the highest and best authority (a) the primary mission of the Roman Catholic parochial schools, whose students defendants acknowledge - constitute 86% of the religious school students in this City who receive Chapter 1 services, is to imbue their young wards with a firm and

lasting belief in the principles and practices of Roman Catholicism; (2) the subjects taught in those schools that might otherwise appear to be entirely secular are part and parcel of a curriculum and extracurricular activities that serve to further the primary religious mission of the schools; and (3) services rendered to the students of those schools also support the schools and their primary religious mission. One authority to which plaintiffs refer is Justice Brennan, speaking not only from the facts of record in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but also from personal knowledge and experience, when he stated that --

> ". . . the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." (403 U.S. at 616-17, Brennan J. concurring)

8. The foregoing statement was subsequently quoted with approval by Justice Stewart in *Meek v. Pittenger* 421 U.S. 349, 364 65 (1975).

9. More recent, and perhaps even more competent, authority, stressing the rededication of Roman Catholic schools in New York City to their primary religious mission is to be found in the following statements of Roman Catholic Bishop Thomas V. Dailey in a pastoral letter issued to the 1,500,000 parishioners in the Brooklyn Diocese, as quoted in *The New York Times* of December 1, 1993, page B1.

> "The primary mission of the parochial schools remains 'the teaching of the Catholic religion,' the bishop said, responding to concerns that Catholic education had been losing its sense of purpose as nuns disappeared from the classrooms and the number of non-Catholic students increased

> "'Each school will be mandated to develop and publish a mission statement, which will include a statement of 'Catholic Identity,' Bishop Dailey said. That identity 'is paramount,' he said. Without it, the Catholic school 'has no reason for existence'"

10. That the same set of facts applies, perhaps even more forcefully, to the Hassidic schools, whose students defendants acknowledge constitute the next largest group in this City receiving Chapter 1 services. (See, the opinion of Justice Souter speaking for a majority of the Court in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S. Ct. 2481 [19941.)

11. A preliminary Weiss claim which the Board spokesperson makes as if it were axiomatic, is apparently intended to avoid the thrust of the foregoing authoritative statements:

> "The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools." (Weiss Decl, p.5, par. 14.)

12. It is respectfully submitted that one does not need to be an education exert to appreciate the fact that using public funds to improve the scholastic qualifications of the below grade-level students in a religious school effectively provides at least three distinct and valuable services to the school and its general student population (a) it enables the school to avoid spending the time, effort and/or money for that purpose or to spend the same for another purpose or other purposes that it might otherwise have to spend for that purpose; (b) it enables the school' s teachers and grade level, as well as below-grade-level, students to proceed with their regular classroom

instruction more quickly and effectively; and, of course, (3) it raises the school' s scholastic reputation and attracts better students.

13. It is respectfully submitted that it is against the foregoing factual background that the defendants' educational concerns and claims must be considered and will be considered below. Preliminarily, however, it is necessary to show that their relevance, materiality and alleged merit are based on certain assumptions that are either clearly erroneous or at best challengeable.

The Erroneous Assumptions in Defendants' Claims

14. There are several erroneous assumptions in defendants' claim for relief from the mandate of the Supreme Court in *Aguilar*. The first and most obvious is that the request for relief is misdirected. The determination in *Aguilar* does not require the Secretary, the (Chancellor or any other government official or agency

to spend one cent towards providing Chapter 1 services in any form to religious students *off the premises* of their home schools. The determination under consideration does no more than to prohibit the use of public funds to provide Chapter 1 services *on the premises* of those school. The alleged burden of providing Chapter 1 services to religious school children under New York City's current plan is the result of determinations made by the Congress, the Secretary and the Chancellor rather than the Supreme Court in *Aguilar*.

15. This first erroneous assumption is especially pertinent to the chief complaint of the moving defendants which is directed against the lack of federal funds in the present and foreseeable future to defray the "non-instructional costs" involved in the City' s present plan. The moving defendants point out that, because of the lack of federal funds, the money to defray the

non-instructional costs will now come "off the top" of the Chapter 1 funds allocated to the City. That procedure substantially reduces the amount of the City' s allocation available for Chapter 1 instructional services. (As plaintiffs have noted, the procedure also effectively makes the public schools students eligible to receive Chapter 1 services pay for the cost of furnishing those services to religious students.) The procedure in question, however, is the result of a determination made by the Congress which has decided to spend less money on education and by the Secretary who devised the "off-the-top" procedure, not by the Supreme Court in *Aguilar*.

16. A second erroneous assumption of the defendants is that the alleged burden of providing Chapter 1 services to religious students "off premises" is pertinent to the real issue the moving defendants seek to raise in the present improper proceeding, which is whether the

Supreme Court ought to overrule *Aguilar*. If, as the Court held in *Aguilar*, using public funds to provide Chapter 1 services on the premises of religious schools is constitutionally impermissible solely because of "excessive entanglement" of church and state (as defendants claim) or because of its "primary effect" of advancing religion as well (as plaintiffs claim), it is clear that the alleged burden of providing Chapter 1 services "off premises" is immaterial if not wholly irrelevant. For example, the necessity of compliance with the constitutional right of trial by jury is undoubtedly a burden, financially and otherwise, on our Judicial system, but it is more than doubtful if a motion for relief from that "burden" would be entertained by this Court or any court in this connately. If, on the other hand, the determination in *Aguilar* is incorrect, and the practice of providing Chapter 1 service "on premises" is constitutionally permissible, then there

is certainly no need to consider the burden of providing Chapter 1 services "off premises."

17. A third erroneous assumption of defendants is that in the provision of Chapter 1 services to religious school students in public schools ("Public School Sites") the religious school children should be deemed to be in a category inferior to that of public school students rather than an equal part of the general student population of this City. This particular assumption, of course, is in direct contradiction to defendants' "child benefit theory" and their claim that the purpose and effect of the Chapter 1 statute and the New York City plan is to provide Chapter 1 services to students without regard to whether they regularly attend religious schools or public schools. More to the point, this assumption undercuts defendants' claim that the high "noninstructional costs" of providing Chapter 1 services to religious school students is the result of lack

of space at Public School Sites, where, defendants acknowledge, such costs are minimal.

18. To the extent that, since *Aguilar*, an increase in the student population in New York City, has resulted in a shortage of space in the public schools of the City, it is respectfully submitted that such shortage may not properly be used, as defendants use it, as an excuse for excluding religious school students from receiving Chapter 1 services in public schools, any more than it is used to exclude public school students from receiving any type of educational census in those schools. Viewed in that light, the alleged high cost of providing Chapter 1 services to religious school students "off premises" at other than Public School Sites, such as in expensive mobile instructional units ("MIUs") is the result of a solution adopted or followed by the Chancellor or Board of Education of the City of New York (Board of Education

or "Board") to resolve the problem of shortage in space in the public schools of this City by first excluding religious school students from receiving Chapter 1 services in public schools before excluding public school students from receiving any type of services in those schools. That solution is not the necessary result of the determination of the Supreme Court in *Aguilar*.

19. The foregoing view is confirmed by events that occurred in the year following *Aguilar* when the Chancellor' s predecessor in office was developing the current New York City plan (the "Alternative Plan") for providing Chapter 1 services to religious school students "off premises." It is a matter of written record that the central feature of the original plan developed by the former Chancellor was an offer to the principals of 80% of the religious schools whose students had received Chapter 1 services "on premises" prior to Aguilar to have

their students receive those services at "matching" public schools close by their religious schools. (Fourth Bi-Monthly Report of the Chancellor to Judge Neaher, p. 9, par. 26, a copy of which is annexed to this affirmation as Exhibit A) That offer was flatly rejected by the principals of the schools to whom it was made and by the parents of the students at those schools.

20. That situation with respect to space continued until the school year 1990-91, as shown by the chart annexed as "Figure 2" to the 1995 report of Alan G. Hevesi, the Comptroller of the City of New York, entitled "Overcrowding in New York City Public Schools: Where Do We Go from Here." (See, Weiss Decl., Exh 7.) There was little or no excuse, therefore, based on shortage of space in public schools for failing to provide Chapter 1 services to religious school students at Public School Sites for several years after *Aguilar*. The Hevesi Report,

moreover, makes it clear that there was no good reason for failing to provide Chapter 1 services to religious school students at such sites in and after 1990-91 under the same emergency conditions that have been adopted by the Chancellor (or Board of Education) or are suggested in the Report for providing educational services to public school students.

21. Which leads to a fourth erroneous, or at best questionable, assumption of defendants which is that Public School Sites sites are allegedly unsuitable for providing Chapter 1 services to religious school students. The alleged reasons are set forth in the Weiss declaration where they are made to appear as if they are based on solid fact and professional expertise. It is respectfully submitted that on closer scrutiny it becomes apparent that the brief statement of the alleged reasons in the Weiss declaration contains only conclusory generalizations of

which the declarant does not even profess to have personal knowledge on a subject that clearly does not require any special expertise. It is respectfully repeated, therefore, that, if the pending motions are allowed to go forward, the allegations in the Weiss Declaration concerning the alleged high cost of compliance with *Aguilar* should be the subject of a plenary hearing.

The Weiss Claims Concerning the alleged Burden of Compliance with Aguilar

(A) The Claims concerning the Unsuitability of the Public School Sites

22. Initially, it should be noted that since the only sites for providing Chapter 1 services to religious school students in use in the City's present plan that plaintiffs do not believe to be in violation of the Establishment Clause are the Public School Sites, it would be inconsistent if not hypocritical to challenge the Weiss claims with respect to the suitability of the other sites.

23. The reasons alleged in the Weiss Declaration for the alleged unsuitability of Public School Sites are: (a) the time lost by religious school students travelling between their home school and such sites; (b) the alleged dangers that might be encountered on the way; (c) the alleged lack of individualized instruction; and (d) the alleged lack of consultation between Chapter 1 personnel and their religious school counterparts.

24. The lack of merit in the first two of these alleged reasons becomes apparent when it is revealed that most of the matching Public School Sites in the offer made by the Chancellor' s predecessor in office were, and still are, no more than a block away from the religious schools with which they were paired. The Chancellor' s predecessor estimated that the time lost in travelling between the paired sites would be approximately 10 minutes (Exh. A annexed hereto, p. 8, par. 22) which is

no more than the standard time for a recess between classes. The alleged dangers en route are even more questionable. It is conceivable, but not likely, that harm might befall religious students walking between their home schools and nearby Public School Sites, and even less likely if the students are moved by minibus or other vehicle. In any event, the Weiss Declaration is devoid of any specific example of any actual harm coming to any religious school student while travelling between his home school and a Public School Site on any occasion in the last decade.

25. The first two reasons given in the Weiss Declaration for the alleged unsuitability of Public School Sites were the same as those given by the principals and parents of religious school students when the Chancellor's predecessor made his offer of matching Public School Students in 1986. It has always been the position of

plaintiffs that those reasons were so transparently without merit that they constituted an attempt to camouflage the opposition of both principals and parents to any plan or program that would require their students to attend public schools for any purpose. The issue thus raised by plaintiffs has never been given a full airing, and, it is respectfully submitted, provides another reason why, if this proceeding is allowed to be a vehicle for having the Supreme Court reconsider it determination in *Aguilar*, there should be a plenary hearing herein.

26. The third reason alleged in the Weiss declaration for the unsuitability of "off premises" sites (alleged lack of face-to-face communication) is so obviously not applicable to Public School Sites that it is not considered by the declarant in connection with such sites, but only in connection with computer-assisted instruction ("CAI") which is actually provided to religious

school students "on premises" or at home. (Weiss Decal., pars. 75, 82.) With respect to the final reason (alleged lack of consultation between Chapter 1 personnel and their religious school counterparts), it is conclusorily stated that

> "It is often extremely burdensome to hold conversations between the Board's Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school . . . that is located a mile or more away from the private school .... (Id., par. 85.)
>
> An alternative is to hold consultations between the Board's Chapter 1 staff and private school staff by telephone.... Obviously, 'this is not as effective as a meeting, especially when the teachers need to refer to records." (Id,, par. 85.)

27. As indicated, one answer to the foregoing is that it is unusual for a Public School Site to be "more than one mile or more away from the private [religious] school"

with which it is paired. Secondly, even if the two schools were a mile or more apart, it hardly would seem to be "extremely burdensome" for a conscientious religious school teacher to make the trip a few times in a school year. (Although in this respect the Weiss declaration refers to a federal "guidance" document [Decl., Exh 9, par. 28], neither the declaration nor the "guidance" document gives any indication of how often the religious school teacher ought to make the trip. Lastly, there should be no difficulty in consultations by telephone if copies of records are transmitted by mail prior to such consultations. It is respectfully submitted that the Weiss claim with respect to consultations attempts to make a mountain out of a molehill.

(B) The Claims concerning the Alleged "Costs of Compliance with the Judgment"

28. A large part of the Weiss declaration deals with the financial costs of providing Chapter 1 services to

religious students "off premises." It is respectfully submitted, however that any extended consideration of such costs is unnecessary for several reasons: (a) plaintiff do not challenge the figures quoted in the declaration; if anything, we believe they are even greater than quoted; (b) as noted, by far the greatest portion of these costs are "noninstructional" costs attributable to MIU' s the use of which we considered to be in violation of the Establishment Clause; (c) non-instructional costs attributable to Public School Sites are minimal; and (d) lastly, but by no means least importantly, it bears repeating that, assuming for argument purposes, but hardly conceding, that this proceeding should be allowed to be used as a vehicle for the Supreme Court reconsidering its determination in *Aguilar*, neither the alleged financial costs nor the other alleged burdens of New York's current plan for providing

Chapter 1 services to religious school students are material or relevant to that issue.

29. The figures cited in the Weiss declaration nevertheless require two comments. First of all New York City' s contract, recently renewed, and the expenditures thereunder for MIUs, the most important component of the City' s current plan for providing Chapter 1 service to religious school students, has been roundly criticized as being extremely extravagant by the office of Comptroller Hevesi' s predecessor, Harrison Goldin. (Letter dated April 26, 1988 from Roger D. Liwer, Director of Audits of the Comptroller' s office, to Steven Schwager, Chief School Business Executive of the Board of Education, a copy of which is annexed hereto as Exhibit B.) Secondly, it was brought to the attention of the Chancellor' s predecessor in office that, whereas an MIU costs $106,000 per unit per year, a standing unit of the same proportion could be

constructed a few years ago for a non-recurring cost of only $50,000. If such standing units were installed in the corners of playgrounds at matching Public School Sites, they would immeasurably reduce the cost of providing Chapter 1 services to religious school students "off premises."

Conclusion

30. It is respectfully repeated that, as noted in the memorandum of the Secretary, the motions of the Chancellor and the Intervenors are improper, obviously known to the movants to be so, and, accordingly, should not be entertained.

31. Alternatively, if entertained, and thereby allowed to be a vehicle for having the Supreme Court reconsider its determination in *Aguilar*, it is respectfully submitted that there should be a plenary hearing to determine the actual and detailed facts pertinent to the

alleged burden of compliance with that determination so that there will be a complete and intelligent, record before the Supreme Court.

32. Lastly, if the pending motions are entertained, with or without a hearing, they should be denied with sanctions imposed on the moving defendants.

Dated: December 26, 1995

STANLEY GELLER

REPLY DECLARATION OF MARGARET O. WEISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

----------x

REPLY DECLARATION

78CV-1750 (JG)

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I submit this declaration in reply to plaintiffs' opposition to defendant Chancellor of the Board of Education of the City of New York' s motion for relief from the judgment in this action, and in further support of the Chancellor' s motion.

Public School Sites and Spays Limitations

2. As noted by plaintiffs' counsel, Stanley Geller, in his declaration date December 26, 1995 (hereafter "Geller Decl.") (at paragraph 19), when the post-Aguilar plan was developed in the spring of 1986 to comply with this Court' s judgment, the Board of

Education of the City School District of the City of New York (hereafter the "Board of Education" or the "Board") was able to offer services in public school sites to the Chapter 1 students in 80% of the participating private schools, or 194 of the 242 participating private schools. (The term "private school," as used herein, refers to schools which are affected by the judgment m this case.)

3. However, of these 194 private schools, the parents and principals of only 52 private schools accepted the offered public school sites. Thus, only 3,578 private school students received Chapter 1 services at public school sites during school year 1986-1987. As discussed in my Declaration of October 16, 1995 in support of the Chancellor' s motion (hereafter "Initial Weiss Decl.") (at paragraph 32), the primary reasons given for declination of the public school sites were the loss of classroom instructional time caused by travel time between the private

and public school sites, and concerns regarding safety during transit between the private and public school sites.

4. Even in the 1986-87 school year, there was insufficient space in the public schools to accommodate all private school students who had been receiving Chapter 1 services. Accordingly, 70 Mobile Instructional Units were obtained to provide additional sites for Chapter 1 services for private school students. Further, 13 Leased Sites were obtained which also provided additional space for Chapter 1 services.

5. However, during the 1986-1987 school year, the use of these three methods of service delivery resulted in only 10,661 private school students from 141 private schools receiving Chapter 1 services in New York City. This was an enormous decrease in the number of private school students served. During the 1985-1986 school year (the final year in which the Board provided Chapter 1

services to private school students by sending its teachers and other professional staff into the private schools) 20,965 students from 247 private schools received Chapter 1 services in New York City. Accordingly, 10,304 fewer private school students received Chapter 1 services in New York City after the post-Aguilar plan was implemented. This represents a decrease of approximately 50% in the number of private school students served by Chapter 1.

6. This loss of services for 10,304 students, who were in need of remedial education because of below grade educational achievement, and who resided within defined poverty areas, was an educational tragedy. Accordingly, the Board of Education worked to develop and expand the other methods of service delivery--Computer Assisted Instruction, Mobile Instructional Units and leased sites which are now used to provide Chapter 1 services for private school students (in addition to public

school sites). Over the intervening years, the use of these three other service delivery methods has resulted in the restoration of the participation level of private school students in the Chapter 1 program to approximately the pre-Aguilar level; in school year 1993-1994, the Board of Education provided Chapter 1 services to 21,795 students from 257 private schools.

7. Further, as is thoroughly described in the January 1995 Report of Alan G. Hevesi, Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go from Here? (the report is annexed as Exhibit "7" to the Initial Weiss Decl., see also paragraphs 35-38 of the Initial Weiss Decl.), since 1989, there has been an explosive growth in public school enrollment in the City of New York, which has led to severe overcrowding in the public schools. The public school population has grown 10%, from 940,208 students

to 1,034,235 students, in the eight year period from October 1986 to October 1994. As a result, the public school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats.

8. As a result of the severe overcrowding, the Board of Education has lost 23 of the public school sites that it used for Chapter 1 services for private school students in the early years of the post-Aguilar Chapter 1 program. Thus, the availability of pubic school sites for the provision of Chapter 1 services to private school students is significantly less now than it was in 1986, when the post-Aguilar plan was first developed. Nor is the situation likely to improve. The Comptroller finds that there is insufficient time and, due to the current budget problems, insufficient funds, to build enough new public school facilities to meet the need for increased public

school space. Further, based on studies of patterns of birth rates and immigration, it is projected that the current extraordinary growth rate (an increase of approximately 20,000 students per year) will continue into the next decade, and that the severe overcrowding situation will get even worse. The projection is that the enrollment in the New York City public schools will increase by over 240,000 in the nine years between 1993 and 2002. In 2002, the projected total public school enrollment will be over 1,256,000. (Exhibit "7" to the Initial Weiss Decl. pp. ES-1, 23-27, 36).

9. Plaintiffs' counsel asserts that notwithstanding this severe overcrowding situation, the Board of Education should serve all private school students receiving Chapter 1 services at public school sites, and then suggests that this can be done by utilizing the same methods to reduce overcrowding for public school students

proposed in the Comptroller's Report. (Geller Decl., paragraph 20).

10. First, as the Comptroller's Report makes clear, the principle proposed methods to relieve overcrowding for public school students--building new schools or expanding existing schools (Exhibit "7" to the Initial Weiss Decl., pp. 26-27, 36, 51), bussing students to schools which are often far from their homes (Exhibit "7," pp. 30-35), "double shifting" (having the student population attend school on two different schedules during the day) and changing to a year-round school calendar (Exhibit "7," pp. 43-49)--have not yet been either implemented or widely implemented for the variety of reasons discussed in the Report, and where implemented, have not been successful in adequately addressing the existing overcrowding problem for the public school student population.

11. According to the Comptroller's Report, building or expanding schools is both too slow and too expensive (Exhibit "7" to the Initial Weiss Decl., p. 36), bussing students to distant schools meets with strong resistance from public school parents who do not want their children to spend additional travel time and do not want them attending school in a remote location (Exhibit "7," p. 32) and "double shifting" can adversely affect both the quantity and quality of education, by creating such problems as school days beginning and/or ending after dark, the disruption of after school activities and deterioration in the quality of the school environment (Exhibit "7," pp. 38-42). The proposed year-round school calendar has not been implemented in New York City, and prior to implementation, there would be many problems to overcome, such as the absence of air conditioning, parent

and staff resistance and legal requirements. (Exhibit "7," pp. 48-50).

12. Further, the problems created by bussing public school students to distant schools for the entire school day, are even more problematic for Chapter 1 private school students, who are normally receiving Chapter 1 services for approximately one hour during their regular school day. It is simply not possible to bus private students to a distant public school site during the course of their regular school day; the loss of their regular class instructional time would be too great. In addition, double shifting is not even relevant to these private school students, since they are receiving Chapter 1 instruction for approximately an hour during a school day. Furthermore, their regular school day schedule is established by their private school, not by the Board of Education.

13. Finally, another solution to relieve overcrowding discussed by the Comptroller is the use of leased space for classroom use. (Exhibit "7" Initial Weiss Decl., pp. 27-30). This is a method the Board of Education already utilizes to provide Chapter 1 services to private school students.

The Cost of Mobile Instructional Units (hereafter "MIUs")

14. Plaintiffs' counsel states that the cost of the MIUs was found to be "extremely extravagant" by the Office of the Comptroller of the City of New York (Geller Declaration, paragraph 27) and attaches a letter as Exhibit "B," to his Declaration, dated April 26, 1988, from Roger D. Liwer, Director of Audits of the Office of the Comptroller to Steven Schwager, Chief School Business Executive of the Board of Education. This letter does not state that the cost of the MIUs was "extremely extravagant," although the letter does state that the Board

should have obtained MIUs at less cost. In addition, this letter is not a final report of the Comptroller's Office, but as stated on page 1 of the letter, simply documents some "preliminary findings."

15. Plaintiffs' counsel has not attached Mr. Schwager's response to Mr. Liwer, by letter dated April 28, 1988, which is annexed hereto as Exhibit "1." Mr. Schwager pointed out many errors and incorrect assumptions in Mr. Liwer's letter. For example, Mr. Schwager noted that the conclusion that the cost of the Board of Education's MIUs was higher than necessary, was based in large part on a "cost" comparison of the Board' s mobile instructional units with mobile instructional units used in other jurisdictions, and that the comparison was defective. Mr. Schwager pointed out that the costs of most MIUs from other jurisdictions cited by Mr. Liwer covered only the cost of the vehicle. Mr. Liwer then compared that

cost to the Board of Education's cost. However, the Board of Education's cost figure includes not only the cost of the vehicle, but the cost of the unionized driver (whose salary and fringes exceed $30,000 per year), as well as the costs of maintenance, repairs, cleaning, garaging, fuel and insurance.

16. In addition, the Board of Education's MIUs were not a standard model, but were custom designed. Although this made each unit more expensive, as Mr. Liwer noted, it allowed the Board of Education to design each MIU to simultaneously house two Chapter 1 functions; the custom design contains both an instructional area for a staff person and up to ten students, and a second small group area in which a staff person (such as a guidance counselor or school psychologist) can meet with a student and/or parent, an English as a Second Language teacher can provide small group instruction for up to four

students, and consultation between staff or between a parent and staff can be held. Had the Board of Education used the same standard models as other jurisdictions cited by the Office of the Comptroller, only one activity could have occurred in each MIU at any one time. The cost of each unit would have been somewhat less, but a significant number of additional units would have been required to fulfill the same functions and the overall expenditure for MIUs would have been greater. Finally, the custom design allowed the Board of Education to incorporate very stringent safety features in the design, as mandated by the New York City Fire and Building Departments.

17. Plaintiffs' counsel also states that the Board of Education could have obtained Stationary Instructional Units (hereafter "SIUs"), which are small structures built to accommodate Chapter 1 classes. (Geller Decl., paragraph 27). Although the Board has not used SIUs as

a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program.

18. There were several concerns about the use of SIUs. The first was a legal concern. At the time this method was under consideration, in 1987 and 1988, there were serious legal concerns raised by the placing of SIUs on property owned by religiously-affiliated private schools. The New York State Education Department initially stated, in July 1985, that this was prohibited by Aguilar (see Memorandum from Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs for the State Education Department, annexed as Exhibit "6" to the Initial Weiss Decl.), and the United States Department of Education stated in June 1986, that SIUs could be placed on the property of religiously-affiliated private schools only in limited circumstances. (See June 1986 Guidance on Aguilar v. Felton and Chapter 1 of the Education

Consolidation and Improvement Act, Questions and Answers, question 29, annexed as Exhibit "9" to the Initial Weiss Decl.). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

19. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

20. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in

New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

21. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be $100,000. (See Exhibit "2" annexed hereto, letter to Robert Esnard from Steven Schwager, dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

22. Plaintiffs' counsel also asserts (Geller Decl., paragraph 27) that we could have placed SIUs in "the corners of playgrounds" on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in

many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' counsel's proposal would have been bitterly opposed by the affected public schools.

23. In addition, plaintiffs' counsel's proposal would have necessitated the same loss of instructional time through travel that has previously been described in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Additional Factual Assertions

24. Plaintiffs' counsel further asserts (Geller Decl., paragraph 10) that the defendants acknowledge that students who attend Hasidic schools constitute the second largest group of private school students receiving Chapter 1 services in New York City. This statement is inaccurate and has not been acknowledged by defendants. The second largest group of private school students receiving Chapter 1 services in New York City are students attending Hebrew Day Schools. This is a term which is used by the Board of Education to denote all schools which are affiliated with any branch of the Jewish religion. Thus, a Hebrew Day School may be affiliated with a Hasidic Jewish organization, an Orthodox Jewish organization, a Conservative Jewish organization, etc. The Board of Education makes no official inquiry, in the course of administering the Chapter 1 program, as to the affiliations

of the Hebrew Day Schools whose students participate in the Chapter 1 program. However, for the purpose of preparing this declaration, a member of my staff who has personal knowledge of the affiliations of the Hebrew Day Schools, reviewed the list of the 42 schools whose students participate in the Chapter 1 program, and informed me that 11 of these schools are affiliated with Hasidic Jewish groups and the remaining 31 Hebrew Day Schools are not affiliated with Hasidic Jewish groups.

25. Plaintiffs' counsel also states that there is a "standard time for a recess between classes" of approximately 10 minutes (10 minutes is the maximum one-way vehicular travel time used in the transport of private school students to Chapter 1 sites). (Geller Decl., paragraph 24). However, approximately 85% of the private schoolchildren served in the Board of Education's Chapter 1 program are in the elementary school grades

(kindergarten through sixth grade). In elementary school grades, in both the public and private schools, there are no regular class changes nor recess between classes; students are in one class, and normally stay in the same room with the same teacher for the full school day. Accordingly, when private school students travel to a public school (or leased) site for Chapter 1 instruction during the course of the school day, the time spent traveling is normally time in which they would otherwise be receiving instruction in their regular school class, not "recess" time.

26. Finally, plaintiffs' counsel asserts that most of the public school sites selected under the original 1986 Board of Education plan were no more than one City block from the private school and cites to ¶ 22 of the June 3, 1986 affidavit of Joseph Saccente (annexed to the Geller Decl. as Exhibit "A") in support of that assertion. The Saccente affidavit does not state that most of the offered

public school sites were less than a block from the private school, and my own recollection is that most of the offered public school sites were more distant. Indeed, documents provided to plaintiff's counsel in discovery in the related case of Committee for Public Education and Religious Liberty, et al. v. Secretary, United States Department of Education, et al., 88 Civ. 96 (JG), also pending before this Court, show that of the public school sites utilized for Chapter 1 services, only about 5% of the public school sites were less than a block from the private school, another 5% were one block from the private school, and 90% were further, with most being 1/4 to 3/4 of a mile away from the private school.

Conclusion

27. For the foregoing reasons, it is respectfully requested that the defendant Chancellor's motion for relief from the judgment be granted.

Dated: Brooklyn, New York
January 19, 1996

MARGARET O. WEISS

STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON

In 1985, the Supreme Court held in Aguilar v. Felton that it is unconstitutional for public school personnel to provide instruction in religiously-affiliated private schools under Title I of the Elementary and Secondary Education Act. This decision has caused continuing problems in the Title I program for both public and private school children who need extra help. I therefore support reconsideration of the Felton decision in an appropriate case. In my opinion, Felton does not advance the progress of education or pass the test of good common sense. At a time when school budgets are under increased scrutiny, Felton places an additional undue burden on them.

The Felton decision has had a significant negative impact on Title I services for the neediest children in both public and private schools. Importantly, the costs of

compl. ıce with Felton are taken off the top of the school district's total Title I allocation, prior to providing funds for comparable instructional services for public and private school children. Therefore, compliance with Felton reduces the amount of Title I funds available for public school children, as well as private school children. Also, in the years immediately following the decision, there was a dramatic decrease in the number of private school children participating in the Title I program. Although the number has increased in subsequent years, the underlying problems caused by the Felton decision continue. Instead of having Title I services in their own school buildings, as public school children generally have, religious school children must go to another location to receive instruction from a teacher. This creates not only logistical problems, but significantly increases costs (for such things as transportation or the purchase or rental of

mobile vans) which adversely affects both public and private school children. I believe we must make more effective use of Title I dollars to support our neediest students in both public and private schools. Felton stands in the way of our doing so.

Based on a 1989 study by the General Accounting Office, we estimate that school districts have expended hundreds of millions of dollars on non-instructional costs in order to comply with Felton. For example, for the 1995-96 school year, New York City alone is budgeting $16 million for these costs. It is estimated that $10 million of this amount will come from a special Title I appropriation, but the remaining $6 million will have to come off the top of New York City' s regular Title I grant. This $6 million could be used to serve 5600 additional needy students in both public and private schools, or alternatively to improve services for the thousands of

children already being served under Title I in New York City. However, until Felton is reconsidered, New York City and other school districts must continue to comply with that decision.

As demonstrated by the facts of the original case, we believe that Title I services can be provided in private schools without aiding religion or creating excessive entanglement between government and religion. This Department has also supported and defended in litigation a variety of alternative arrangements for providing Title I services for private school children, including providing computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property. There has been criticism, however, that even the alternative arrangements that have developed as a result of Felton are not the most educationally effective methods for providing Title I

services. In addition, the Felton decision at times has caused unnecessary tension between public and private school officials concerning how and where Title I services should be provided for private school children.

In light of these continuing problems, I support efforts to have the Felton decision reconsidered in an appropriate case.

CERTIFICATION OF COPY OF DEPARTMENT RECORD

Pursuant to the provisions of 20 U.S.C. 3485 and the authority vested in me by redelegation from the General Counsel, I hereby certify that the attached document entitled "STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON" is a true and accurate copy of a document issued by the United States Secretary of Education on October 25, 1995.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Department of Education, on this 14th day of December 1995.

Philip Rosenfelt
Assistant General Counsel for
Elementary, Secondary, Adult
and Vocational Education

RESOLUTION OF THE BOARD OF EDUCATION

BD.ED.MTG Jun. 7, 1995

CAL. NO. 20-1

SUBSTITUTE RESOLUTION

June 7, 1995 Calendar, Item

AUTHORIZATION TO COMMENCE LEGAL PROCEEDINGS TO SEEK RELIEF FROM THE JUDGMENT IN AGUILAR v. FELTON

The following resolution is presented for adoption:

WHEREAS, for twenty years prior to 1986, the Board of Education provided required remedial educational and support services to economically and educationally disadvantaged students attending nonpublic religious schools on the premises of their religious schools in accordance with Chapter 1 of the Elementary and Secondary Education Act; and

WHEREAS, by decision dated July 1, 1985, in Aguilar v. Felton, 473 U.S. 402 (1985), the United States Supreme Court (by a vote of five for, and four opposed) held that it was a violation of the Establishment Clause of the First Amendment to the United States Constitution to have public school teachers and support staff provide such services on the premises of religious schools; and

WHEREAS, in response to such decision, the Board of Education thereafter developed an alternative program for providing the required Chapter 1 services to economically and educationally disadvantaged students attending nonpublic religious schools, which program includes the providing of services in leased mobile instructional units, in leased neutral sites, in public schools (which space is very limited), and through a system of interactive computer technology called computer assisted instruction; and

WHEREAS, the delivery of such services by these alternative methods has proven to be very expensive (for example, the annual leasing cost for each mobile instructional unit (which includes the services of a driver, garaging, maintenance repairs, insurance) is $106,934; the total current annual cost for leasing 126 units is $13,473,684; and the total annual cost for leasing 10 neutral sites which are presently used is $105,624) thereby significantly reducing the limited funds now available for providing needed Chapter 1 remedial services to both public school students and nonpublic school students; and

WHEREAS, since federal regulations require that non-instructional administrative costs for providing Chapter 1 services be taken "off the top" of the Board's total Chapter 1 allocation from the federal government (34 C.F.R. 200.52 (a)(2)), Chapter 1 funds may therefore only

be divided between public and private school students after these administrative expenses are deducted; and

WHEREAS, anticipated reductions in available funding to cover these service delivery costs means that in the future additional scarce resources will have to be diverted from providing needed remedial and support services to both public and nonpublic school students to cover these service delivery costs; and

WHEREAS, the Board of Education and the Chancellor also believe that it is educationally preferable to provide remedial and support services on the premises of students' regular schools, as is done for public school students, in that:

1) the use of mobile instructional units, neutral sites, and public school sites involves the loss of much needed regular classroom instructional time for

Chapter 1 students because of the time used to travel to offsite premises;

2) in the case of computer assisted instruction, there is no simultaneous face-to-face instruction by a teacher to support and reinforce the computerized instruction and

3) entitled Chapter 1 economically and educationally disadvantaged students in religious schools who are all performing below grade level in one or more subjects can ill afford such instructional time loss or other factors which negatively affect the delivery of services; and

WHEREAS, in 1994, in the United States Supreme Court's decision in Board Of Education of Kiryas Joel School District v. Grumet, 114 S.Ct. 2481 (1994), a majority of the Justices indicated that the Supreme Court should overrule or reconsider Aguilar v. Felton, supra; now, therefore be it

RESOLVED, that in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that Aguilar v. Felton should be revisited, the Board of Education hereby authorizes the Corporation Counsel of the City of New York to take those steps necessary to commence legal proceedings, as soon as possible, seeking relief from the judgment in Aguilar v. Felton and, if necessary, reconsideration and overruling of the Supreme Court's holding in Aguilar v. Felton.

EXPLANATION

Chapter 1 requires the Board of Education to provide remedial and support services to eligible students attending nonpublic religious schools.

The Board of Education provided effective remedial and support services to Chapter 1 economically and educationally disadvantaged eligible students on the premises of their nonpublic religious- schools for twenty (20) years, without any proven evidence of entanglement between the religious school and the public school system; classrooms, materials, and staff were maintained separate and distinct from the educational program provided by the religious school.

Given that significant funds are required to be expended on the alternative methods now necessary because of the Aguilar v. Felton decision, thereby diverting scarce resources from eligible public and

nonpublic school students, as well as the loss of instructional time of students attending nonpublic religious schools, the Board and Chancellor believe it necessary to seek relief from the judgment in Aguilar v. Felton. Given the views expressed by a majority of the Justices in the Kirvas Joel case, there is a serious question whether Aguilar v. Felton commands the continuing support of a majority of the Court.

The Board and the Chancellor believe that the Chapter 1 program in New York City presents a proper and compelling case for the reconsideration of Aguilar v. Felton. Indeed, the Board and Chancellor believe it would be irresponsible in this time of national, state, and city fiscal crises not to take such action so as to ensure the best uses of scarce and diminishing educational resources.